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IN THE

Supreme Court of the United States

October Term, 1952
Nos. 205 and 206

No. 205

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY,

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY, a Corporation.

On Writs of Certiorari to the Supreme Court of the State of California.

MOTION FOR REHEARING.

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Respondent, California Electric Power Company, moves the Court for a Rehearing herein for the purpose of reconciling the judgment herein and the judgment of the

Court of Appeals for the 9th Circuit in No. 12987 (No. 495 this Court), entitled California Electric Power Company, a corporation, Petitioner, v. Federal Power Commission, Respondent, and County of Mineral, State of Nevada, and United States of America, Intervenors, and as grounds therefor states:

The judgment herein was entered on April 6, 1953, reversing the judgment of the Supreme Court of California which had affirmed the order of California Public Utilities Commission, holding that said Commission had exclusive jurisdiction over rates charged by Power Company to the United States Navy and Mineral County, but stating in the Opinion of this Court that the question was not ripe for decision, because the record in these cases did not disclose whether or not energy sold by Power Company for resale could be segregated from that sold for consumption, and indicating that California Public Utilities Commission should have an opportunity to consider that problem and perfect the record. This Court expressly distinguished *Pennsylvania Water and Power Co. v. FPC*, 343 U. S. 414.

On April 13, 1953, this Court denied the petition of California Electric Power Company in No. 12987 (No. 495 this Court) for Certiorari to correct the judgment of the 9th Circuit which held that the same state of facts was governed by *Pennsylvania Water and Power Co. v. FPC (supra)* and indicating that, not only in that case, but in practically all such cases, it would be impossible or inexpedient or too much trouble to segregate energy sold for resale from energy sold for consumption.

It is obvious that the theory of the 9th Circuit was not followed by this Court, the reasons given being not only that this case was not the same as *Pennsylvania Water and Power Company v. FPC (supra)*, but that possibly even FPC had altered its views since the order of April 12, 1951, was entered, which is involved in all these cases. This Court cited *Colorado Interstate Gas Co. v. FPC*, 185 F. 2d 357, and *City of Hastings v. Kansas-Nebraska National Gas Co., FPC*, Opinion No. 244, February 5, 1953.

In *City of Hastings v. Kansas-Nebraska National Gas Co. (supra), FPC*, Mr. Commissioner Buchanan in dissenting, relied strongly on the decision of the 9th Circuit in *California Electric Power Company v. FPC (supra)*, but the majority of the Commission, though mentioning that case, did not follow it, but held that gas sold to the City of Hastings through a single gate or pipeline for resale and also for consumption could be segregated between that subject to FPC jurisdiction and that subject to state jurisdiction.

It has probably been overlooked that the record lodged with this Court in No. 12987 (No. 495 this Court) *California Electric Power Company v. FPC*, Exhibit 32 (introduced by United States) shows the segregation by years 1943-1948 and Exhibit 22 for years 1949 to February, 1950.

The reason why in these cases there is no history of separate negotiations or contracts for resale and consumed power is that apparently neither Navy nor Power Company ever considered that there was any sale or purchase for resale. The power negotiated and contracted for was "for use of the Government's Naval

Ammunition Depot, Hawthorne, Nevada." [Ex. 1, Case No. 495.]. "Resale" was first mentioned after the matter was presented to FPC by Navy and discriminating legal interpretations began to be placed on the acts of the parties.

We also suggest that it is probably not correct to place so much emphasis on contractual arrangements or provisions, for the jurisdiction of FPC depends on statutory classification arising from the nature of the commerce itself and not the names, terms, or interpretations which the parties by contract or otherwise place upon it.

We submit that in justice to Respondent Company and especially to a state regulatory body such as California Public Utilities Commission, this Court should explain by memorandum or otherwise that it intended to qualify the opinion of the 9th Circuit in No. 12987 (No. 495 this Court), so as to recognize the legal separability of power sold for resale and power sold for consumption through common facilities if the separation is scientifically or practically possible.

Respectfully submitted,

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Attorneys for Respondent California Electric Power Company, Riverside, California.

April 17, 1953.